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Published in:
European Business Law Review

IMPORTANT NOTE: You are advised to consult the publisher's version (publisher's PDF) if you wish to cite from it. Please check the document version below.

Document Version
Publisher's PDF, also known as Version of record

Publication date:
2017

[Link to publication in University of Groningen/UMCG research database](#)

Citation for published version (APA):

Wessel, R. A., & Takács, T. (2017). Constitutional aspects of the EU's global actorness: increased exclusivity in trade and investment and the role of the European Parliament. *European Business Law Review*, 28(2), 103-117.

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Constitutional Aspects of the EU's Global Actorness: Increased Exclusivity in Trade and Investment and the Role of the European Parliament

RAMSES A. WESSEL AND TAMARA TAKÁCS*

Abstract

This article argues that 'exclusive' competences were instrumental in the development of the EU as a global actor. These competences were particularly helpful in building the EU's trade and investment policy. The main question raised is to what extent the European Parliament has been able to ensure parliamentary control over these policy areas. It is argued that both new Treaty provisions and Parliament's own activism have turned the EP into an important actor in relation to control over the Union's Common Commercial Policy. At the same time, the question is whether the EU's own constitutional system is sufficient to guarantee the legitimacy of the EU's external (economic) activities.

1. Introduction

It is a truism that the first steps of the European Union as a global actor were in the area of trade. For decades the EU's external relations were the result of its developing Common Commercial Policy (CCP) and the need for the Union (by then the Community) to become active internationally in fields that internally no longer were in the hands of the Member States. The 'exclusivity' of this area forms a key source of the EU's international actorness. At the same time it has triggered the debate on whether the democratic control was moved from the Member States to the Union to match the transfer of competences. This paper will not revisit that debate but from a historical perspective; it will rather measure the role of the European Parliament against the widening of exclusivity in relation to trade and investment in the post-Lisbon era.

The objectives set out in the European Treaties require the EU to take the role of an international actor separate from its Member States.¹ At the same time, the basic

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¹ See Art. 21 of the Consolidated Version of the Treaty on European Union, OJ [2012] C 326/13, 26 October 2012 [hereinafter TEU] for the Union's general objectives for its external actions. Christina Eckes and Ramses A Wessel, *The European Union from an International Perspective: Sovereignty,*

assumption remains that European external actions develop in a supportive parallelism to the EU's internal policies.² This has also for long been the position of the Court of Justice of the European Union (CJEU).³ Part of this contribution aims to demonstrate that the opposite can also be true, namely that the Union's participation in international relations reflects back onto its internal constitutional landscape.⁴

Irrespective of the difficulty to classify the European Union from the perspective of international law, there is agreement that as an international actor, the EU is subject to international law in its relations with third states and international organisations.⁵ It is bound by the international agreements to which it is a party as well as to customary international law.⁶ More recent developments show that international law is capable of taking the differences between states and international organisations into account.⁷ However, against the background of this binary system of rules third states continuously experience that the EU remains special. In certain areas, it holds exclusive competence to act, which is unprecedented. Moreover, EU Member States, and in particular national courts, accept that, in the end, they should give priority to EU law in cases of a conflict with international law.⁸

The current competences relating to trade and investment, and in particular the connection between exclusivity and global actorness, will form the topic of section 2. Section 3 will be used to address the key question in this paper and will assess the role of the European Parliament in this area, both by analysing the relevant provisions and illustrating their impact by examples. Some conclusions will finally be drawn in section 4.

Statehood, and Special Treatment in Takis Tridimas and Robert Schütze (eds.), *The Oxford Principles of European Union Law – Volume 1: The European Union Legal Order* (Oxford University Press 2017).

² Consolidated Version of the Treaty on the Functioning of the European Union, Arts 3 and 216, OJ [2008] C 115, 5 September 2008 [hereinafter TFEU].

³ CJEU, Case 22/70, *Commission v. Council (ERTA)*, E.C.R. 263 (1971).

⁴ Cf. Christina Eckes, *External Relations Law: How the Outside Shapes the Inside*, in Diego Acosta Arcazaro and Cian C Murphy (eds.), *EU Security and Justice Law: After Lisbon and Stockholm*, 42, 186–206 (Oxford, Hart Publishing: Modern studies in European Law 2014).

⁵ See for a recent survey of the many facets of the relationship between international and EU law: Ramses A Wessel, *Close Encounters of the Third Kind: The Interface Between the EU and International Law after the Lisbon Treaty* (Sieps Report, Stockholm 2013).

⁶ More extensively: *Idem*, p 106. See also clearly the judgment of the CJEU in case C-366/10, *Air Transport Association of America, American Airlines Inc., Continental Airlines Inc., United Airlines Inc. v. Secretary of State for Energy and Climate Change*, 21 December 2011 <<http://curia.europa.eu/juris/document/document.jsf?text=&docid=117193&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=368298>> (accessed 10 December 2015).

⁷ Respectively to be found at <http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_2_1986.pdf>; and <http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_11_2011.pdf>. Obviously, the extent to which these instruments successfully take the complex position of international organizations into account may be subject to debate.

⁸ See more generally Jan Klabbers, *Treaty Conflict and the European Union* (Cambridge University Press 2009).

2. Competences Relating to Trade and Investment

2.1. Types of External Competences

The issue of competence is undoubtedly one of the most challenging aspects of EU external relations law.⁹ The starting point is the *principle of conferral*, and all TFEU provisions on competence lead back to this essential principle stated in Article 5 in the Treaty on European Union. This Article states that the limits of Union competences are governed by the principle of conferral, meaning that it shall act only within the limits of the competences conferred upon it by the Member States in the TEU and TFEU to attain the objectives set out therein. Any competences not conferred upon the EU in the Treaties remain with the Member States (Articles 5(1) and 5(2) TEU). The TFEU then fleshes out Article 5 TEU in its Articles 2 – 6 TFEU contained in Title I of Part I TFEU entitled “categories and areas of Union competence”. In other words, these five TFEU provisions concern the *existence* and *nature* of EU competence to act.

In the present contribution we focus on the nature of EU competence and in particular on the relation between exclusivity and global actorhood. Article 2(1) TFEU explains what it means for the EU to possess an *exclusive* competence (Member States can no longer act), paragraph 2 describes what it means for the EU and the Member States to *share* competences (member states can act under certain conditions), and paragraphs 3 and 5 describes what we call coordinative, supportive or supplementary competence. Paragraph 4 pertains to the Union’s Common Foreign and Security Policy (CFSP), and upon careful reading actually concerns the *existence* of that competence (‘The Union shall have competence ...’), without saying anything on the nature of the CFSP competence. The five areas in which the Union shall have exclusive competence are listed in Article 3 TFEU: (a) customs union; (b) the establishing of the competition rules necessary for the functioning of the internal market; (c) monetary policy for the Member States whose currency is the euro; (d) the conservation of marine biological resources under the common fisheries policy; (e) common commercial policy. Of these five policies, common commercial policy is the only which is purely external in nature, though the other four policies certainly have external aspects to them. In order to comprehend the move to exclusivity addressed in the present contribution, it is important to note that exclusivity come in different shapes and forms. First, exclusivity based directly on the interpretation of the provisions in the EU Treaty. This is called *a priori exclusivity* or *policy area exclusivity*, because EU primary law itself states that certain policy areas are to be exercised exclusively by the Union (Article 3(1) TFEU). Second, exclusivity that follows from the adoption of internal Union measures, the Member States being excluded to adopt rules which

⁹ See more extensively Chapters 1 and 4 in Bart Van Vooren and RA Wessel, *EU External Relations Law: Text, Cases and Materials* (Cambridge University Press 2014).

affect EU measures. This is called conditional exclusivity or pre-emption,¹⁰ because the Treaties and CJEU case-law lay out a number of conditions for the Member States to lose their competence to act (Article 3(2) TFEU). Third, exclusive powers can occur when absolutely indispensable to achieve EU Treaty objectives, without there being internal EU measures. This is a small sub-category of conditional exclusivity called *exclusivity through necessity* (Article 3(2) TFEU).

Trade and investment belong to the first category of *a priori* exclusive powers. As seen, the Treaty of Rome only expressly attributed powers to the EEC in the sphere of Common Commercial Policy and the conclusion of association agreements. These articles were entirely silent on how they affected Member States' foreign relations authority, and therefore the Court was soon called upon to clarify the *nature* of EC external competence. This first occurred from the early 1970s onwards in the sphere of international trade and fisheries. Through interpretation by the Court of old article 113 TEEC, the common commercial policy became the prototype EU external relations power which *a priori* excludes powers of the Member States.

It is important to note, however, that the dynamics inherent to EU law may place the distinction between exclusive and shared powers into perspective. Indeed, in the famous *ERTA* judgment the Court already found that when the Union adopts common rules, the Member States may no longer undertake international commitments which would 'affect' those rules.¹¹ The EU's internal legislative action thereby pre-empts individual Member State external action, meaning that the EU has an exclusive external power to the extent that its internal legislation would be affected by such national action. This kind of exclusive external power is in fact nothing but the conceptual counterpart of shared pre-emptive competences. Pre-emptive exclusivity is a potential of a certain class of EU competences shared with the Member States. It has also been the driving force behind the development of most external competences of the Union in the sense that further internal integration has – through this mechanism – limited the individual or collective external powers of Member States.

2.2. *The Connection between Exclusivity and Global Actorness*

As we have seen, the Treaty of Lisbon has certainly strengthened the EU's 'international actorness' and confirms the separate legal status of the EU. We have reminded our readers that from a legal perspective it makes sense to continue distinguishing between the European Union as an international organization of which states can be members, and the (member) states themselves. In that sense the EU is something different than the collection of 28 states. It has a distinct legal status, both in relation to its own members as well as towards third states. But, importantly, the Member States may no longer be allowed to act once competences have been transferred and have been placed 'exclusively' in the hands of the Union. It is a fact that "the prominence

¹⁰ The term 'conditional exclusivity' comes from Paul Craig and Gráinne De Búrca (eds.), *The Evolution of EU Law*, 79 (2nd ed., Oxford University Press 2011).

¹¹ CJEU, Case 22/70 (*ERTA*), 263.

of the international role of the EU has had an impact on the Member States and the manner in which they exercise their powers as sovereign subjects of international law both in terms of their interactions with third countries and their participation in international organisations.”¹² As a consequence, depending on the legal existence, scope and nature of the EU's external powers, the Member States have to a lesser or greater degree a prominent role in the formation and execution of international action in the relevant area. Conversely, the role of the European Union (as the legal person) and its supranational institutions will then shift depending on the policy area at issue. The relationship between the EU and international law is based on this phenomenon and the Treaty of Lisbon has maintained this ambiguity, which continues to make it difficult to live up to the demands of coherence and consistency in its external relation policy, which can be found throughout the treaties (e.g. Article 21(3) TEU). This means that also in practice the question remains when the European Union can act internationally (next to or on behalf of its Member States) in international treaty negotiations and in international organisations.¹³ In October 2011 the EU agreed on a set of rules in this regard in an internal document,¹⁴ which also states that in issuing declarations on behalf of the European Union account should be given to the division of competences.

While one may argue that the EU's 'global actorness' is primarily related to the simple existence of an EU external competence, the development of the EU as a global actor cannot be disconnected from the phenomenon of exclusivity. Hence, the nature of a competence matters. In the words of Eeckhout “the case-law on exclusive external competences is a remarkable achievement, which has enabled the EU to become an international actor, in consonance with its internal competences, policies and objectives.”¹⁵ Traditionally, the Common Commercial Policy has been the area allowing the Union (and earlier the Community) to forge its international actorness. The reason for the exclusivity in this area is well-known and is phrased by Eeckhout as follows: “In light of the strong link with the common/internal market, the common commercial policy has to be uniform, and this uniformity requires exclusive EU competence. AETR exclusive implied powers are no more than a particular form of pre-

¹² Panos Koutrakos, *In Search of a Voice: EU law Constraints on Member States in International Law-Making* in Rain Liivoja and Jarna Petman (eds.), *International Law-Making: Essays in Honour of Jan Klabbers*, 209–224 (Oxford: Routledge 2014).

¹³ See, for example, the recent discussions between the Council and the Commission on the composition of a negotiating team in the framework of UN cooperation on mercury. Geert De Baere, *Mercury Rising: The European Union and the International Negotiations for a Globally Binding Instrument on Mercury* 37 *European Law Review* 640–655 (2012).

¹⁴ Council of the European Union, “EU Statements in Multilateral Organisations – General Arrangements”, 15901/11, 24 October 2011 <<http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2015901%202011%20INIT>> (16 December 2015).

¹⁵ Piet Eeckhout, *Exclusive External Competences: Constructing the EU as an International Actor* in Allan Rosas, Egils Levits and Yves Bot (eds.), *Court of Justice of the European Union – Cour de Justice de l'Union Européenne, The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law – La Cour de Justice et la Construction de l'Europe: Analyses et Perspectives de Soixante Ans de Jurisprudence*, 613–636, at 635 (T. M. C. Asser Press 2013).

emption: it is to safeguard the effectiveness and uniformity of internal EU legislation, that the Member States are precluded from entering into international commitments which could affect such legislation or alter its scope.”¹⁶

As we have seen, trade and investment policy are areas which owe their exclusivity directly to the Treaty.¹⁷ The consequence is that when the Union adopts common rules, the Member States may no longer undertake international commitments which would ‘affect’ those rules. The EU’s internal legislative action thereby pre-empts individual Member State external action, meaning that the EU has an exclusive external power to the extent that its internal legislation would be affected by such national action (cf. the *ERTA* judgement¹⁸). On the basis of Article 3(2) TFEU this implies that the Union (1) shall have exclusive competence for the conclusion of (2) an international agreement when its conclusion is provided for in a legislative act of the Union or (3) is necessary to enable the Union to exercise its internal competence, or (4) in so far as its conclusion may affect common rules or alter their scope.

CCP exclusivity dates back to Opinion 1/75, where the CJEU argued that the Member States had set up a Common Market, and the CCP was conceived to defend the common external interests of the Community in its operation. If the Member States could continue to act alongside the Community to defend their own interests, the essence of pooling interests at the supranational level would be impinged: “It cannot therefore be accepted that, in a field such as that governed by the understanding in question, which is covered by export policy and more generally by the Common Commercial Policy, the Member States should exercise a power concurrent to that of the Community, in the Community sphere, and in the international sphere.”¹⁹ It was thus up to the Community to act globally and not just in relation to its own Member States. In relation to *ERTA*, Post spoke of the CJEU as forcefully promoting “the emergence of a distinctive transnational entity endowed with forms of authority that are both significant and unique”.²⁰ This observation is equally valid for case law on the scope of the CCP and subsequent rulings. Through its purposive and dynamic interpretation the Court strengthened the Community as an international actor with its wide common commercial policy, which excluded Member State action in the field.

Post-Lisbon, the scope of CCP’s exclusivity was even widened. It now falls completely within exclusive Union competence, including those services sectors (health, culture, education) where the European Union had only *supporting* competence to

¹⁶ Eeckhout, *Exclusive External Competences*, 634.

¹⁷ Article 2(1) TFEU: “When the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts.” See also Art. 3(1) TFEU mentioned above.

¹⁸ CJEU, Case 22/70(*ERTA*).

¹⁹ Opinion 1/75, ECR 1975-01355 (1975).

²⁰ Robert Post, *Constructing the European Polity: ERTA and the Open Skies Judgments* in Miguel Poiares Maduro and Loïc Azoulay (eds.), *The Past and Future of EU Law*, 234 (Hart Publishing 2010).

act internally.²¹ Internal voting rules, more specifically Article 207(4), however, indicate a carving out of veto power by Member States in the areas of cultural and audiovisual services, as well as social, education and health services, of which trade related aspects should be decided unanimously in Council. Together with the reference to “commercial aspects of intellectual property”, the CCP is not only linked to the GATT, but also to the two other key WTO agreements, the General Agreement on Trade in Services (GATS) and the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). This is of course a huge step ahead in comparison to the ECJ's rather conservative reading on the nature of CCP in its Opinion 1/94, in which exclusivity for the GATS and TRIPS related issues was excluded and hence mixity of competences confirmed.²²

At the same time foreign direct investment (FDI) was brought under the exclusive competence of the Union. International investment operates in a different way than traditional trade. International trade agreements deal with the exchange of goods and cross-border services between two or more states (or the EU for that matter), whereas international investment agreements aim to protect foreign investment in a specific country. In addition, while trade agreements today often take a (regional) multilateral form, agreements regarding investment continue to exist mostly in a bilateral format. However, it is often difficult to separate the two areas, which makes it important that both are covered by the CCP.

That this may have serious consequences for a large number of existing international agreements is exemplified by the so-called, *BITs* (Bilateral Investment Treaties) cases.²³ The EU's presence in the field of foreign investment not only forms an example of new international ambitions, but ironically also triggered the traditional reflex: an acceptance of the authority of international law, but at the same time a preservation of the autonomy of EU law. Although the cases differ from for instance the *PFOS* case,²⁴ they seem to reflect a similar trend: exclusivity by stealth. The outcome of the *BITs* cases is that all (over 1000) *BITs* will have to be renegotiated in order to prevent incompatibilities with EU law. As indicated by Dimopoulos, the long-term objective of the EU is to replace Member State *BITs* with EU Investment Agreements. In the meantime an authorization system should combine the validity of the *BITs* that were concluded on the basis of international treaty law with the primacy of EU law.²⁵

²¹ Cf. Marise Cremona, *Balancing Union and Member State Interests: Opinion 1/2008, Choice of Legal Base and the Common Commercial Policy Under the Treaty of Lisbon* 35 *European Law Review* 678–694 (2010).

²² CJEU Opinion 1/94, See Meinhard Hilf, *The ECJ's Opinion 1/94 on the WTO – No Surprise, But Wise?* 6 *European Journal of International Law* 245–259 (1995).

²³ CJEU, Case C-205/06 *Commission v. Austria* ECR I-1301 (2009); Case C-249/06 *Commission v. Sweden* ECR I-1335 (2009); Case C-118/07 *Commission v. Finland* ECR I-10889 (2009).

²⁴ CJEU, Case C-246/07, *Commission v. Sweden* (PFOS), ECR I-3317 (2010).

²⁵ A. Dimopoulos, *The BITs Cases and their Practical and Doctrinal Implications* in J Diez-Hochleitner et al. (eds.), *Recent Trends in the Case Law of the Court of Justice of the European Union (2008–2011)*, 737–758 (La Ley 2012).

In relation to our democratic concerns (see section 4), it is good to remember that CCP is not just a key external relations policy, but in substantive terms, is at the heart of the European integration project and a logical consequence of the interaction between internal and external developments: e.g. the European Economic Community as a customs union and the rules of free trade laid down in the GATT. Indeed, “European integration itself was launched in the shadow of the pre-existing General Agreement on Tariffs and Trade (GATT), and continues to be shaped within the more comprehensive WTO framework.”²⁶ Also in quantitative terms, CCP cannot be ignored: most of the agreements concluded between the EU and third states concern trade or at least deal with trade-related issues.²⁷ Since CCP (unlike for instance CFSP or the AFSJ) has been part and parcel of the European integration process from the outset, a vast amount of legislation and case law exists. At the same time the EU considers CCP to be an instrument of foreign policy and has continuously linked it to development issues, environmental policies or CFSP. Importantly, association and cooperation agreements opening up the Internal Market to countries in the extended European- and its neighbouring region serve as important tools of influencing political developments,²⁸ for some countries with the hope of eventual EU membership. This is reflected by the listing of trade policy among the various external action objectives in current Article 21 TEU. Article 206 TFEU explicitly refers to ‘the Union’ rather than to the Member States and, thereby, underlines that the development of world trade has shifted from the Member States to the European Union.

The underlying principles of CCP are mentioned in Article 207 TFEU and are elaborated upon in specific instruments. Article 207(1) provides:

“The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union’s external action.”

Even if trade forms the core element of the Union’s external relations (being part of ‘The Union’s External Action’ in Part Five TFEU), CCP is to be formulated and

²⁶ Joris Larik, *Much More Than Trade: The Common Commercial Policy in a Global Context* in Malcolm Evans and Panos Koutrakos (eds.), *Beyond the Established Legal Orders: Policy Interconnections Between the EU and the Rest of the World*, 13–45 at 16 (Hart Publishing 2011).

²⁷ Cf. Mario Mendez, *The Legal Effects of EU Agreements: Maximalist Treaty Enforcement and Judicial Avoidance Techniques* (Oxford University Press 2013).

²⁸ See Karolien Pieters, *The Integration of the Mediterranean Neighbours in the Internal Market* (T.M.C. Asser Press 2010), Steven Blockmans and Adam Łazowski (eds.), *The European Union and its Neighbours – A Legal Appraisal of the EU’s Policies of Stabilisation, Partnership and Integration* (T.M.C Asser Press 2006).

implemented with the general objectives and principles of its external action in mind. These are expressed, next to Article 21 TEU, also in a more succinct form in Article 3(5) TEU:

“In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.”

This formed a reason for Dimopoulos to argue that “[...] the Lisbon Treaty marks a new era for the orientation of the CCP. It signals the transformation of the CCP from an autonomous field of EU external action, subject to its own rules and objectives, into an integrated part of EU external relations, characterized by common values that guarantee unity and consistency in the exercise of Union powers. [...] In particular, the references to fair trade and integration to the world economy next to liberalization illustrate that trade liberalization should not be seen any longer as a self-determining objective, but it should be regarded within the broader context of economic and social development objectives.”²⁹

3. Democratic Control over Trade and Investment

The existence and use of exclusive competences limits the role of EU Member States and hence of their parliaments. The Lisbon Treaty had significant impact on the institutional structure in decision-making relevant to trade matters, including the adoption of internal measures (and thus on the implementation of trade and investment policy), the negotiation procedure for trade and investment agreements as well as the ratification of these agreements. The significant change lies with the serious upgrade of the European Parliament – the only directly elected EU institution – resulting in an increased involvement as well as consultation and information rights in the trade negotiation procedures, the need for Parliamentary consent, as well as its co-legislator role, together with the Council, in relation to the adoption of trade measures. These reforms have long been called for, and were in fact already included in the ill-fated Constitutional Treaty.³⁰

²⁹ A. Dimopoulos, *The Effects of the Lisbon Treaty on the Principles and Objectives of the Common Commercial Policy* 15 *European Foreign Affairs Review* 153–170 (2010).

³⁰ See pleas for more Parliamentary involvement put forward by Rafael Leal-Arcas, *Theory and Practice of EC External Trade Policy* (Cameron and May 2008), and Markus Krajewski, *External Trade Law and the Constitution Treaty: Towards a Federal and More Democratic Common Commercial Policy?* 42 *Common Market Law Review* 91–127 (2005).

The below overview will assess the reforms on the basis of selected examples from the first (albeit not full) legislative term after the entry into force of the Lisbon Treaty. While before the entry into force of the Lisbon Treaty, the EP had no formal role and legal or political clout in the negotiation process of trade agreements, a number of initiatives offered informal but gradually institutionalised involvement. The ‘Luns-Westerterp’ procedure provided for the Commission’s contact with Parliament, so as to inform and consult the latter.³¹ An Interinstitutional framework agreement from 2005 further expressed the aspirations of information provision toward the EP by the Commission “both during the phase of preparation of agreements and during the conduct and conclusion of international negotiations”, and doing so “in a timeframe that allows Parliament to reflect and express its views and for the Commission to take the latter into account.”³² The EP’s emerging position in trade negotiations was expressed through its INTA committee, specialised in trade matters, which was set up in the same year, marking the increasing interest and status in this policy area.

The Interinstitutional Agreement between the Commission and EP already in 2006³³ revealed an increase of information rights for the EP and this was further strengthened in a subsequent Interinstitutional Agreement in 2010.³⁴ These information and consultation modalities were then institutionalised and formalised in the Lisbon Treaty. Thus, in the negotiations and conclusions of international agreements, including trade and investment agreements, the EP “shall be immediately and duly informed”.³⁵ As to the specific phases in the negotiation procedure, the EP’s role varies. It remains important to note that Parliament cannot assign binding guidelines with regard to the adoption of negotiating mandates.³⁶ The drafting of negotiation directives rests with the Commission (in form of recommendations) with the Council adopting the negotiation directives, authorising the negotiations and, through its Trade Policy Committee – formerly known as Article 133 Committee – assisting the Commission during the negotiations. One could regard this as being to the disadvantage of the EP, however, it has been noted that despite the explicit authorisation power, the EP has means and tools of ‘soft power’, in the form of “non-binding Parliamentary resolutions, hearings, opinions and questions to the Commission”³⁷ to indicate political prefer-

³¹ See Laura Richardson, *The Post-Lisbon Role of the European Parliament in the EU’s Common Commercial Policy: Implications for Bilateral Trade Negotiations*, 9 (College of Europe, Department of EU International Relations and Diplomacy Studies, 2012); Stephen Woolcock, *The Treaty of Lisbon and the European Union as an Actor in International Trade*, ECIPE Working Paper, No. 1, European Centre for International Political Economy (2010) <http://www.ecipe.org/media/publication_pdfs/the-treaty-of-lisbon-and-the-european-union-as-an-actor-in-international-trade.pdf> (accessed 16 December 2015).

³² Richardson, *The Post-Lisbon Role of the European Parliament*, 9.

³³ OJ C 117E. 18.5.2006, pp 21–23.

³⁴ See Annex 3, point 3. OJ L 304, 20 November 2010, 47–62.

³⁵ Art. 218(10) TFEU.

³⁶ In contrast to the US Congress, see Stephen Woolcock, *EU Trade and Investment Policymaking after the Lisbon Treaty* 45 Intereconomics 22–25 at 23 (2010) <http://www.ceps.eu/system/files/article/2010/02/22-25-Woolcock_0.pdf> (accessed 16 December 2015).

³⁷ Laura Richardson citing David Kleimann, *Taking Stock: EU Common Commercial Policy in the Lisbon Era*, CEPS Working Document, No. 346, Centre for European Policy Studies (CEPS), 7

ences that can influence the content of negotiations.³⁸ Raising the red flags at such early stages reveal issues that can be deemed to be of most concern to the constituency and relevant stakeholders whose concerns Parliament can thus display. Such clear indication of preferences took place, for example before the approval of negotiating mandate with Japan, where Parliament raised concerns in relation to Japan's willingness to remove trade barriers, and asked to obtain information from the Council before the launch of the negotiations.³⁹ Similarly, and perhaps even more prominently, the EP had very early on voiced its opinion so as to shape the negotiating mandate for Transatlantic Trade and Investment Partnership (TTIP), the agreement currently under negotiation between the EU and the United States. The EP thus *inter alia* called for the tackling of regulatory convergence, the inclusion of environmental and labour aspects of trade and sustainable development, the inclusion of financial services, it underlined the sensitivity of agricultural sector and audiovisual services, and in general terms emphasised the need for the Commission to engage with a wide range of stakeholders in a continuous and transparent manner.⁴⁰

Through the actual negotiations, the above noted continuous information and consultation right brings the EP into the forefront and in fact turn it into a player with an increasingly accepted status in trade matters, albeit largely informally. While the 2010 Interinstitutional Agreement offers the possibility of granting observer status to MEPs who form part of Union delegations to meetings of bodies set up by multilateral international agreements involving the EU⁴¹ – similar to the involvement of the EP in the workings of the WTO⁴² – direct participation in actual trade negotiations is conditioned by the Commission's authorisation, and subject to legal, technical and diplomatic possibilities. It can be noted that Parliament's role has been most remarkable through the discussions revolving around linkages between social, labour, human rights and environmental as well as sustainable development on the one hand, and market access offered to negotiating partners, on the other hand.⁴³ Indeed, it is through these linkages, connecting general public concerns and the EU's economic-commercial interests of free trade and investment and liberalisation, that the EP's involvement has even to a large extent changed the character of CCP. The active channeling of

(2011) <<http://www.ceps.eu/book/taking-stock-eu-common-commercial-policy-lisbon-era>> (accessed 16 December 2015).

³⁸ Richardson, *The Post-Lisbon Role of the European Parliament*, 9.

³⁹ 'EU negotiations with Japan', Library Briefing, 17/10/2012.

⁴⁰ 'European Parliament resolution of 23 May 2013 on EU trade and investment negotiations with the United States of America', 23 May 2013; 'European Parliament resolution of 23 May 2013 on EU trade and investment negotiations with the United States of America', 23 May 2013.

⁴¹ Arts 25–26, OJ L 304, 20 November 2010.

⁴² Marika Armanoviča and Roberto Benidini, *The Role of the EP in Shaping the European Union's External Trade Policy after the Entry Into Force of the Lisbon Treaty*, Directorate-General for External Policies, Policy Department, 7 (2014) <http://www.europarl.europa.eu/RegData/etudes/briefing_note/join/2014/522336/EXPO-JOIN_SP%282014%29522336_EN.pdf> (accessed 16 December 2015).

⁴³ Lore Van den Putte, Ferdi De Ville and Jan Orbie, *The European Parliament's New Role in Trade Policy: Turning Power Into Impact*, CEPS Special Report, No. 89, Center for European Policy Studies (2014) <<http://www.ceps.eu/book/european-parliament%E2%80%99s-new-role-trade-policy-turning-power-impact>> (accessed 16 December 2015).

public concerns via public debates, questions, (non-binding) resolutions and the increased contact between the EP, lobbyists and their constituents more than hint at an increase of the democratic legitimacy of trade negotiations. In fact, some had voiced concerns in relation to the EP's input concerning trade negotiations, the latter being often seen as technocratic trade negotiations – conducted by the 'technocratic Commission' – and they warned against the 'politicisation' of the process, and the negative impact of the EP's involvement on the traditionally secretive negotiations as well as the risk of unduly blocking and/or throwing back the course of negotiations.⁴⁴ It has been noted, however, that due to the "restricted dissemination of the content of trade negotiations", the technocratic character has not been in general, modified.⁴⁵ Nevertheless, it was exactly such restriction to the dissemination of content, that has spurred intense debate in relation to the ongoing TTIP negotiations calling for increased openness and transparency for the negotiation rounds, and seeking information to the public. As a result of such calls, the Council has made the negotiating mandate public.⁴⁶ The pressure for making TTIP negotiations more transparent came from the European Ombudsman,⁴⁷ but also from Parliament's side, condemning the 'reading room arrangement' for MEPs to look into negotiation documents, and through a noticeable general assertiveness in gaining information and looking into documents of ongoing negotiations toward international agreements.⁴⁸ Parliament will continue to have an important role in channeling public concern in the TTIP negotiations and expressing these in its recommendations to the Commission. Accordingly, Parliament's recommendations to the Commission, adopted on 8 July 2015, call for a high protection of consumer data and health and safety standards, a special treatment for sensitive agricultural and industrial products and 'no agreement' in too diverging areas such as cloning, GMOs and the authorisation of chemicals.⁴⁹ Another

⁴⁴ See, for example, Anne Pollet-Fort, *Implications of the Lisbon Treaty on the External Trade Policy*, EU Center in Singapore, Background brief No. 2, 3 (2010).

⁴⁵ Armanovića and Benidini, *The Role of the EP in Shaping the European Union's External Trade Policy*, 7. In addition, the Interinstitutional agreement between Council and Parliament calls for respect of confidentiality. See Inter-institutional Agreement of 12 March 2014 between the European Parliament and the Council concerning the forwarding to and handling by the European Parliament of classified information held by the Council on matters other than those in the area of the common foreign and security policy, OJ C 95, 1.4.2014, p 1–7.

⁴⁶ Council of the European Union, *TTIP Negotiating Mandate Made Public*, Press Release of 9 October 2014 <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/145014.pdf> (accessed 17 December 2015).

⁴⁷ European Ombudsman, *Ombudsman asks Council and Commission to Publish more TTIP Documents*, Press release 17/2014, 31 July 2014 <<http://www.ombudsman.europa.eu/en/press/release.faces/en/54636/html.bookmark>> (accessed 17 December 2015).

⁴⁸ See MEP Hautula's call for more transparency in the negotiations and information sharing toward Parliament: *Lack of Transparency in TTIP – A Case for the ECJ? Reading Room Arrangement May Contradict the EU Treaties*, 10 July 2014 <<http://ttip2014.eu/blog-detail/blog/TTIP%20ECJ%20Transparency.html>> (accessed 17 December 2015). The cases mentioned are: ECJ (Judgment (First Chamber) of 3 July 2014 in Case C-350/12, *Council of the European Union v. Sophie in't Veld* and Judgment (Grand Chamber) of 24 June 2014 in Case C-658/11 *European Parliament v. Council* (Mauritius-case)).

⁴⁹ Julie Levy-Abegnoli, *TTIP: EU Parliament Vote Paves Way for New ISDS*, The Parliament

controversial topic, dispute settlement, was also addressed by this recommendation: Parliament rejected the idea of private arbitration for disputes under TTIP and called for or a mechanism which would be “subject to democratic principles and scrutiny” and where cases would be dealt with by “publicly appointed, independent professional judges [in] public hearings”.⁵⁰ Consequently, the Commission proposed an ‘investment court system’, to be set up jointly with the US, including a panel of 15 judges and an arbitration tribunal. The introduction of such an investment court, would “enshrine governments’ rights to regulate and ensure transparency and accountability”.⁵¹ These impactful actions by Parliament may add to its democratic control over the course of negotiations and, if used consistently and to the desired result, even shape the EU’s (normative) character as international actor.

Another novelty introduced by the Lisbon Treaty is the European Parliament’s status as co-decider in relation to the CCP. Replacing the previous consultation procedure (where the EP’s position did not bind the Commission and Council), now the ordinary legislative procedure applies, which implies that internal measures on CCP issues need the support of a majority in the EP. On the basis of Article 207(2) TFEU, “The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall adopt the measures defining the framework for implementing the common commercial policy.” This ordinary legislative procedure was for example used for the reform of the Generalised System of Preferences (GSP+) in October 2012 (entering into force in January 2014). Concerning investment, the EP’s involvement in the shaping of EU investment policy, has been significant in highlighting the major public policy and non-economic concerns in this new policy area of CCP.⁵²

The EP’s consent for concluding all international agreements that cover a subject matter to which the ordinary legislative procedure (Article 218(6)) applies, brings all trade and investment agreements under the realm of this potentially powerful Parliamentary tool. Yet, the EP’s consent does not extend to amending trade agreements, and is not needed for provisional application of international agreements or temporal suspension of an agreement. Council decisions to authorise the provisional application of an agreement can be taken on a mere proposal from the Commission without

Magazine, 8 July 2015 <<https://www.theparliamentmagazine.eu/articles/news/ttip-eu-parliament-vote-paves-way-new-isds>> (accessed 17 December 2015).

⁵⁰ European Parliament resolution of 8 July 2015 containing the European Parliament’s recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP).

⁵¹ See European Commission, *Commission Proposes New Investment Court System for TTIP and other EU Trade and Investment Negotiations*, Press release, 16 September 2015.

⁵² For a detailed overview of the EU Institutions’ position on reconciling investment protection with the host states’ regulatory power and public policy choices – an issue of foremost interest for Parliament – see Anna De Luca, *Integrating Non-trade Objectives in the EU Oncoming Investment Policy: What Policy Options For The EU?*, 4 CLEER Working Papers, 65–81(2013).

See Regulation (EU) No1219/2012 on the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral agreements between Member States and third countries.

the need to ask for prior parliamentary consent (Article 218(3) TFEU). The latter rule is of particular importance in relation to CCP, as indicated by the ‘Banana-Agreement’ between the EU and a number of Latin-American States which effectively ended the infamous and long trade dispute. The EU was only able to conclude this deal with the possibility to put it into early provisional application in late 2009. The Latin American countries dropped their WTO cases against the EU in return for easier access to the EU market. On 3 February 2011, the European Parliament then gave its consent to the text. Yet, another example reveals that the (rejection of) consent can serve as a powerful tool for Parliament and “enhance its credibility as veto actor”⁵³ the rejection of the Anti-Counterfeiting Trade Agreement (ACTA) was due to the secrecy of negotiations and the significant public campaign against the agreement that the lack of transparency has ignited.⁵⁴

Because of the current broad scope of the CCP in combination with its exclusive nature, international trade and investment agreements can be concluded by the Union alone, and consequently do not need to be ratified by the Member States, unless a mixed agreement was concluded. It is therefore up to the European Parliament to exercise the necessary democratic control. It has been noted that doing away with the mixity of competence adds to the efficiency of decision-making and thus the policy’s implementation, and consequently may enhance the EU’s actorness, in as much as ratification by national parliaments is not a requirement anymore, which can be more appealing for negotiating partners.⁵⁵

4. Conclusion

The above analyses underline that trade and investment have become more ‘exclusive’ since the Lisbon Treaty. We have also seen that this has enhanced the role of the EU as a global actor. In terms of the democratic assessment of the area, and given the fact that national parliaments have lost influence, the question we raised was whether this development resulted in more involvement of the EP in relation to trade and investment. While it is expected that real impact of Parliament’s Lisbon-enhanced role will truly be visible in the more advanced stages of trade negotiations with important trade partners in the years to come,⁵⁶ the EP has on various instances used its democratic

⁵³ Lore Van den Putte, Ferdi De Ville and Jan Orbie, *The European Parliament’s New Role in Trade Policy: Turning Power Into Impact*, CEPS Special Report, No. 89, Center for European Policy Studies, 1 (2014).

⁵⁴ See Cremona noting that Parliament already in 2010 raised the issue of lack of information over the negotiating text in a resolution and in a subsequent declaration on ACTA’s potentially objectionable content. M Cremona, *The EU’s International Regulatory Policy, Democratic Accountability and the ACTA: A Cautionary Tale* in Marise Cremona and Tamara Takács, *Trade Liberalisation and Standardisation – New Directions in the ‘Low Politics’ of EU Foreign Policy*, CLEER Working Papers 6, 57, 70 (2013).

⁵⁵ See Stephen Woolcock, *The Treaty of Lisbon and the European Union as an Actor in Trade*, ECIPE Working Paper 1 (2010).

⁵⁶ Lore Van den Putte, Ferdi De Ville and Jan Orbie, *The European Parliament’s New Role in*

control and oversight function, and does so in increasingly assertive manner. This is proven by the rejection of ACTA and the way it asserts its information rights in various areas of international negotiations, with the notable example of the TTIP negotiations. Even though the EP (unlike the US Congress) does not have a 'mandating right' at the kick-off of negotiations, it appears that in some negotiations Parliament has very early on laid down issues of public concern that it wishes to shape the agreements (cf. Japan and TTIP). With respect to TTIP, it resulted in an important change in the EU's position with regard to the issue of dispute settlement under the agreement, doing away with ISDS and suggesting a more transparent investment court system. It is yet to see just how assertive Parliament will act relative to the 'red flags' it raised in along the negotiations when the agreements are up for ratification and consent. Parliament has definitely become a lobby point for governments and interest groups, which may increase the democratic legitimacy of well-thought through trade agreements and does not appear to diminish the EU's actorness in the eyes of its partners to an unpredictable partner, whose final move (i.e. consent of the EP) cannot be estimated after years of negotiations.

It will be crucial that both the Commission and the Council find ways to genuinely share information with Parliament so as to avoid situations comparable to what happened with the rejection of ACTA. At the same time – and because of the increasing exclusivity of the area – the EP will have to position itself further as the guardian of European citizens' interests, and add voice to the (European) public concerns in trade and investment negotiations. This has been absolutely obvious with TTIP and will play an important role in how influential Parliament is in the conduct of CCP and in shaping the 'new generation' trade agreements engaged in by the EU. Finally, through a more pronounced status and say in the shaping of trade and investment negotiations, Parliament contributes to fulfilling the EU's objectives of norm-promotion in external relations so as to advance the values prescribed in Article 207 TFEU on the international plane.

At the same time, it is difficult to predict to what extent exclusivity (and democratic control by the EP) will continue to be acceptable now that the political atmosphere calls for democratic scrutiny that is closer to the EU citizens. On 21 December 2016 Advocate General Sharpston argued, in a pending case, that the EU-Singapore Free Trade Agreement can only be concluded by the European Union and the Member States acting jointly.⁵⁷ Whereas the Commission argued that the Agreement could be concluded as an 'EU-only' agreement, the AG points to a number of elements in the Agreement in relation to which the EU lacks an exclusive competence, despite a clear link with trade and investment. Time will tell whether we are on the threshold of a new era, in which European Parliamentary control will increasingly be replaced or supplemented by national parliamentary scrutiny and 'mixity' rather than 'exclusivity' will be the default option.

Trade Policy: Turning Power Into Impact, CEPS Special Report, No. 89, Center for European Policy Studies, 1 (2014).

⁵⁷ Opinion 2/15 of AG Sharpston, 21 December 2016.